LIAW TZE LOONG

v.

PP

HIGH COURT SABAH & SARAWAK, MIRI
STEPHEN CHUNG J
[CRIMINAL APPEAL NO: MYY-42-6-9-2012]
27 MARCH 2013

CRIMINAL LAW: *Corruption - Corruptly giving gratification - Inducement to avoid action being taken - Whether money was actually grabbed from appellant - Whether prosecution established a prima facie case - Whether appellant raised reasonable doubt - Anti-Corruption Act 1997, s. 11(b)*

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Whether trial judge erred in deciding that prosecution had made out a prima facie case - Whether appellant raised reasonable doubt - Whether sentence imposed harsh and excessive - Whether appellate intervention warranted*

CRIMINAL PROCEDURE: *Charge - Amendment - Whether amended charge need to be read and explained to appellant - Failure of - Whether amounted to irregularity - Whether curable under s. 422 Criminal Procedure Code*

CRIMINAL PROCEDURE: *Witness - Calling of witness by prosecution - Whether adverse inference invoked for failure to call witness*

PW9 detained a land cruiser driven by one Hii Siik Hing ('HSH'). PW1 was informed of the said detention and he went to the scene with PW2 and PW3. At the scene, the appellant offered RM2,550 to PW1 as an inducement to refrain from taking action against HSH. Due to the inducement, the appellant was arrested and charged in the Sessions Court for an offence under s. 11(b) of the Anti-Corruption Act 1997 ('ACA') and was convicted and sentenced to 20 months' imprisonment and a fine of RM15,000 in default ten months' imprisonment. Aggrieved, the appellant appealed against the conviction and sentence. During the trial, the appellant submitted that he was never in possession of the land cruiser, and he was not charged for possession of the land cruiser. As such, it was submitted that there was no need for him to bribe PW1 to refrain from taking action against him and HSH. The notes of proceedings showed that there was no evidence that the appellant gave any inducement to avoid an action being taken against him but there was evidence that he had provided inducement to PW1 to refrain from taking action against HSH. The trial judge then amended the charge by deleting the words 'and you' against the appellant from the charge. The appellant

submitted that the trial judge erred in amending the charge and not having the amended charge read to the appellant. It was submitted that this amounted to an irregularity which was not curable under s. 422 of the Criminal Procedure Code. It was contended that the prosecution did not call HSH to testify or to be identified by PW1 during the trial. Since the prosecution did not prove the existence nor the identity of HSH, it was submitted that the trial judge should have invoked an adverse inference against the prosecution. Further, it was argued, *inter alia*, that (i) the trial judge erred in deciding that the prosecution had made out a *prima facie* case against the appellant, (ii) it was PW1 who grabbed the money from the appellant; and (iii) the sentence imposed was harsh and excessive.

Held (partially allowing appeal; sentence varied accordingly):

(1) The amendment to the charge against the appellant was minor. The appellant understood and was not confused or was misled by the amended charge. He was able to make his defence and was not prejudiced by the amendment or the omission to read and explain the amended charge to him. As such, the said omission did not occasion a failure of justice. (para 10)

(2) The prosecution had the discretion to decide whether to call HSH as a witness or to offer him as a witness to the defence. The failure to call HSH as a witness was not fatal to the prosecution's case. PW1, PW2 and PW3 were present at the scene and recognised HSH who was inside the land cruiser and they testified that the appellant had asked PW1 to refrain from taking action against HSH. There was no attempt to conceal or any oblique motive by the prosecution not to call HSH as a witness in the trial. Thus, no adverse inference could be made against the prosecution. Similarly, no adverse inference could be made against the appellant whether to call HSH as a witness when he was offered as a witness by the prosecution to the defence. (paras 13 & 14)

(3) It was the duty of the appellate court to intervene in a case where the trial court had so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion. However, a distinction could be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere. (para 16)

(4) The trial judge had seen and heard the witnesses during the trial. He had dealt with the testimonies of the witnesses and found PW1 and PW3 to be credible witnesses and accepted their evidence. Therefore, the trial judge had correctly made a finding that the prosecution had made out a *prima facie* case against the appellant under s. 11(b) of the ACA and that the appellant in his defence did not raise a reasonable doubt on the prosecution's case. (paras 18 & 19)

(5) The courts normally impose a sentence of imprisonment in corruption cases because a sentence of a fine only has no deterrent effect. Section 16 of the ACA provides that a person who is found guilty on conviction shall be liable to imprisonment for a term of not less that 14 days and not more than 20 years and a fine of not less than five times the sum of the gratification or RM10,000 whichever is the higher. The sentence imposed by the trial court was harsh and excessive. Therefore, a sentence of 12 months' imprisonment and a fine of RM10,000 in default six months' imprisonment was fair and commensurate with the offence. (paras 21 & 23)

Case(s) referred to:
Ali Noruddin Boying v. PP [2010] 10 CLJ 1 HC ***(refd)***
Hamidon Mat Yatim v. PP [1995] 3 CLJ 724 HC ***(refd)***
Hee Nyuk Fook v. PP [1988] 1 LNS 15 SC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
PP v. Lee Hong Kee [1968] 1 LNS 104 HC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Mohd Salim Hamiddulrahman [1998] 4 CLJ 199 HC ***(refd)***
PP v. Ong Kia Chan [2006] 4 CLJ 334 HC ***(refd)***
PP v. Wan Razali Kassim [1970] 1 LNS 121 FC ***(refd)***
Raman Mariappen v. PP [2011] 1 CLJ 739 HC ***(refd)***
S Govindasamy v. PP [1948] 1 LNS 60 HC ***(refd)***
Shahril Yahya v. PP [2011] 1 CLJ 1034 HC ***(refd)***
Singah Mohamed Hussin v. PP [1973] 1 LNS 139 HC ***(refd)***
Tan Thong Jin v. PP [2002] 3 CLJ 552 CA ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, ss. 10(a)(aa), 11(b), 16
Criminal Procedure Code, ss. 158(1), (2), 422

For the appellant - Ranbir Singh; M/s Ranbir S Sangha & Co
For the prosecution - Law Chin How; DPP

[Appeal from Sessions Court, Miri; Criminal Case No: MR-62R-1-2011-1]

Reported by Sandra Gabriel

JUDGMENT

Stephen Chung J:

[1] The appellant was charged for an offence under s. 11(b) of the Anti-Corruption Act 1997 punishable under s. 16 of the Act. On 11 September 2012, he was convicted of the offence and was sentenced to 20 months imprisonment and a fine of RM15,000 in default ten months imprisonment. The appellant has appealed against the order of conviction and sentence of the Sessions Court.

[2] The facts were as follows. On 20 November 2007 at about 5pm, at the junction of LAKU, Jalan Miri to Lambir, PW9 with other police personnel detained a land cruiser bearing registration number QMD 6131 driven by a Hii Siik Hing which was suspected to be a stolen vehicle. Hii Siik Hing ("HSH") was also known as 'Colgate'. PW1 was informed of the detention of the vehicle and he went to the scene with PW2 and PW3. PW1 noticed a Proton Wira vehicle bearing registration number QMJ 298 which was parked about 20 metres from the land cruiser and he saw the appellant who got out of his car.

[3] PW1, PW2 and PW3 went to the appellant's car to inspect the car. PW1 entered and sat on the front passenger seat of the car and the appellant entered and sat in the driver's seat in the car. PW1 testified that the appellant requested PW1 to release his friend (HSH) but PW1 told the appellant that he could not release his friend because his friend had been arrested for being suspected to be involved in car theft cases. PW1 testified that the appellant offered money to PW1 to release his friend but PW1 testified that he warned the appellant that it was an offence to bribe a policeman. PW1 testified that the appellant again offered money to PW1 and PW1 warned him three times not to do so or the appellant would be arrested.

[4] PW1 testified that the appellant took some money and gave the money to PW1. PW1 said that he counted the money outside the car in the presence of the appellant and PW2 and PW3. PW1 said that the money amounted to RM2,550 comprising of 15 pieces of RM100 notes and 21 pieces of RM50 notes. PW1 then ordered PW2 and PW3 to arrest the appellant who was then was brought to CPS Miri together with HSH.

[5] I shall refer to grounds 2.6 and 2.7 in the petition of appeal. During the trial, the appellant submitted that he was never in possession of the land cruiser, that he was not charged for possession of the land cruiser and therefore there was no need for him to bribe PW1 to refrain from taking action against him and HSH. It was submitted that the charge against him was not correct and could not stand.

[6] The notes of proceedings ("NOP") showed that the trial judge partially agreed with the submissions of the appellant that there was no evidence that the appellant gave any inducement to avoid action being taken against the appellant but that there was evidence that he had provided inducement to PW1 to refrain from taking action against HSH. The NOP showed that the trial judge then amended the charge by deleting the words 'and you' against the appellant from the charge.

[7] The appellant submitted that the trial judge had erred in amending the charge, in not having the amended charge to be read to the appellant and for his plea to be taken to the amended charge. It was submitted that the omission by the trial judge to read and explain the amended charge to the appellant was an irregularity which was not curable under s. 422 of the Criminal Procedure Code ("CPC") as it was contrary to a statutory requirement: *S Govindasamy v. PP* [1948] 1 LNS 60; [1949] 1 MLJ 101, *Singah Mohamed Hussin v. PP* [1973] 1 LNS 139; [1973] 2 MLJ 109.

[8] Section 158(1) provides that any court may alter or add to any charge at any time before judgment is pronounced and s. 158(2) provided that every alteration or addition shall be read and explained to the accused. It was decided in *Hee Nyuk Fook v. PP* [1988] 1 LNS 15; [1988] 2 MLJ 360 that the question whether s. 158(2) of the CPC is mandatory or directory depends on the facts and circumstances of a particular case including the nature of the amendment, whether it is purely technical, whether it is in any way substantial to render the omission to read over and explain the amended charge a serious irregularity as to vitiate the proceeding or occasion a failure of justice or whether it is curable under s. 422 of the CPC. No hard and fast rule can be laid down merely from the use of the word "shall" therein. The Supreme Court decided that the provisions contained in s. 158(2) only lay down a rule of procedure and do not relate to the mode of the trial.

[9] From the record of appeal, the trial judge had found that the appellant was not in possession of the alleged stolen land cruiser and was not charged for possession of the land cruiser. The trial judge found that the appellant did not offer the money to PW1 to refrain from taking action against the appellant for possession of the land cruiser. Instead, the trial judge found that the appellant had offered money to PW1 as an inducement to refrain from taking action against HSH for possession of the stolen vehicle. The evidence established that the appellant was arrested for giving the money to PW1 as an inducement to refrain from taking action against HSH.

[10] From the facts and circumstances of the case, the amendment to the charge against the appellant was minor. The record of appeal showed that the appellant understood and was not confused or was misled by the amended charge. He was able to make his defence and was not prejudiced by the amendment or the omission to read and explain the amended charge to him. At all material times he was represented by an experienced counsel. In this case, the omission to read and explain the amendment to the charge did not occasion a failure of justice: see also *PP v. Lee Hong Kee* [1968] 1 LNS 104; [1969] 2 MLJ 60, *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221, *PP v. Ong Kia Chan* [2006] 4 CLJ 334.

[11] I shall now deal with grounds 2.2, 2.3, 2.8 and 2.9 of the petition together in this appeal. The appellant submitted that the prosecution did not call HSH to testify or to be identified by PW1 and the other prosecution witnesses during the trial instead of offering HSH as a witness to the defence at the end of the prosecution's case. It was submitted that the prosecution had not proven the existence nor the identity of HSH and that the trial judge should have invoked an adverse inference against the prosecution.

[12] The evidence showed that PW1 was asked to identify other witnesses during the trial but the prosecution did not call PW1 to identify HSH. The prosecution did not explain the necessity to call HSH to be identified or not. The charge against the appellant did not refer nor state the name of HSH in the charge. HSH was not charged in this case. HSH was only one of the witnesses to be called for the trial. The discretion was on the prosecution to decide whether to call HSH as a witness or to offer him as a witness to the defence.

[13] It was not fatal to the prosecution's case whether to call HSH as a witness or not. The record of appeal showed that during the trial PW1 was asked and had testified that he arrived at the scene after HSH had been stopped by the police at the LAKU junction. The evidence established that PW1, PW2 and PW3 were present at the scene and recognised HSH who was inside the land cruiser. They testified that the appellant had asked PW1 to refrain from taking action against HSH. The evidence showed that the prosecution had sufficiently established the identity of HSH who was present at the scene and that PW1, PW2 and PW3 had recognised or had identified HSH at the scene.

[14] On the evidence as recorded in the record of appeal, there was no attempt at concealment or any oblique motive by the prosecution not to call HSH as a witness in the trial. On the facts and circumstances of this case, no adverse inference could be made against the prosecution. Similarly, no adverse inference could be made against the appellant

whether to call HSH as a witness when he was offered as a witness by the prosecution to the defence. There are no merits on these grounds of appeal: see *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233; [1996] 3 MLJ 560.

[15] I shall deal with the other grounds together including whether the trial judge had erred in deciding that the prosecution had made out a *prima facie* case against the appellant and whether that the appellant had raised a reasonable doubt that he did not offer the money to PW1 as a bribe as an inducement to PW1 to refrain from taking action against HSH instead that it was PW1 who grabbed or snatched the money from the appellant.

[16] An appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. But it is the duty of the appellate court to intervene in a case where the trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion. However, a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere: *Tan Thong Jin v. PP* [2002] 3 CLJ 552.

[17] It is trite law that the findings made by the trial court would generally be respected and that an appellate court is slow to interfere with the findings of the trial court as the trial judge has the advantage of watching and listening to the witnesses during the trial. The trial judge also has the opportunity to scrutinise the demeanour of the witnesses during the trial: *PP v. Wan Razali Kassim* [1970] 1 LNS 121.

[18] In this case, the trial judge had seen and heard the witnesses during the trial. He had dealt with the testimonies of the witnesses and he found PW1 and PW3 to be credible witnesses and accepted their evidence. He found that although there were discrepancies in the testimony of PW2 with those of the other witnesses in particular of PW1 and PW3, he accepted the evidence of PW1 and PW3 to be more credible and the correct version.

[19] There was ample evidence in the record of appeal to support the findings of the trail judge in coming to his decisions that the prosecution had made out a *prima facie* case against the appellant under s. 11(b) of the Anti-Corruption Act 1997 and that the appellant in his defence did not raise a reasonable doubt on the prosecution's case.

[20] On sentence, s. 16 of the Act provided that a person who is found guilty on conviction shall be liable to imprisonment for a term of not less that 14 days and not more than 20 years and a fine of not less than five times the sum of the gratification or RM10,000 whichever is the higher.

[21] In passing sentence, the trial judge had taken into consideration the mitigation, the facts of the case, the nature of the offence, his plea for leniency and that it was his first offence. The courts normally impose a sentence of imprisonment in corruption cases because a sentence of a fine only has no deterrent effect: *Hamidon Mat Yatim v. Public Prosecutor* [1995] 3 CLJ 724. An appellate court should be slow to disturb the sentence imposed by the trial judge unless it is passed on wrong sentencing principles or is manifestly excessive or inadequate on the facts and circumstances of the case.

[22] In assessing the length of custodial sentence, the court is guided by the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy. In *PP v. Mohd Salim Hamiddulrahman* [1998] 4 CLJ 199, the accused was sentenced to eight months imprisonment for offering a bribe of RM170. On appeal the sentence was reduced to five months imprisonment and a fine of RM10,000. In *Raman Mariappen v. PP* [2011] 1 CLJ 739, the accused was sentenced to five months imprisonment and a fine of RM10,000 for soliciting and accepting RM2,000. In *Shahril Yahya v. PP* [2011] 1 CLJ 1034, the accused was sentenced to six months imprisonment and a fine of RM20,000. In *Ali Noruddin Boying v. PP* [2010] 10 CLJ 1, the accused was sentenced to two years imprisonment under s. 10(a)(aa) of the 1997 Act.

[23] In this case, the appellant was sentenced to 20 months imprisonment and a fine of RM15,000 in default ten months imprisonment. The sentence was harsh and excessive. From the above authorities, a sentence of 12 months imprisonment and a fine of RM10,000 in default six months imprisonment is fair and commensurate with the offence under s. 11(b) read together with s. 16 of the Anti-Corruption Act 1997. The appeal against sentence is allowed and varied accordingly.